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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-376

ETTORE COCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

ETTORE COCO,
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v.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, ETTORE COCO, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming a Judgment of the United States District Court for the Southern District of Florida, dated July 6, 1972, convicting him of a violation of 18 U.S.C. Sections 892, 894 and 1951.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, not yet officially reported, is reprinted herein as Appendix A.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 6, 1973. A timely Petition for Rehearing was denied on July 30th, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 891 provides in pertinent part:

* * * *

(6) An extortionate extension of credit is an extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

18 U.S.C. 892 provides in pertinent part:

* * * *

(a) Whoever makes any extortinate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is non-exclusive and in no way limits the effect or applicability of subsection (a):

> (1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor.

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

* * * *

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

18 U.S.C. 894 provides in pertinent part:

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

* * * *

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

18 U.S.C. 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * *

QUESTIONS PRESENTED

1. Whether denial of a separate trial for a defendant who stated his intention to call his co-Defendant as a witness in order to introduce prior statements of the co-Defendant exculpating Defendant constituted an abuse of discretion and denied Petitioner a fair trial.

2. Whether introduction into evidence of a tape-recorded conversation of Petitioner concerning persons not mentioned in the indictment, made long after the crime charged in the indictment, was prejudicial error and thereby deprived Petitioner of a fair trial.

3. Whether the testimony of persons who were not involved in the trimes charged in the indictment concerning Petitioner's reputation was admissible to show a state of mind of the victims named in the indictment or was so prejudicial as to deny Petitioner a fair trial.

4. Where a key government witness has testified contrary to a transcribed telephone conversation with defense counsel, and thus surprised the defense, did the court abuse its discretion and deny the Petitioner substantive due process as well as the right to compulsory production of witness's as guaranteed by the Sixth Amendment, by refusing to grant a brief two (2) hour continuance for the purpose of presenting evidence in rebuttal of such witness's testimony.

STATEMENT OF THE CASE

Petitioner was convicted of "shylocking" activities (18 U.S.C. § 1951, 2, Count 2) and conspiracy to commit "shylocking", (18 U.S.C. § 892 Counts 4, 5).

The gist of the charges was that Petitioner had been a part of a scheme of extortionate activities against Richard Besola and Joel Whitice.

Government witness Harvey Goodman testified that he overheard Petitioner and the co-Defendants discussing the loaning of money to unknown persons. He further testified that he introduced co-Defendant Nash to one Seaman, who was to be a collector.

Government witness Leo Henzel testified to a transaction with co-Defendants not involving Petitioner in any manner.

The named victim in the indictment testified that he borrowed money from defendant Falco in June of 1966. Whitice made weekly payments to Falco from December of 1966 through September of 1969. Whitice did not know Petitioner, could not identify him in the courtroom, but thought he might have been the person who came to collect the money with Falso on one or two occasions.

> "Q. (To Whitice) Did Mr. Coco, if it were he that came by—did he ever make any threats to you or ever put you in fear of bodily harm or bodily harm to your family or anyone else?
>
> A. No, he never made any threats to me."

Whitice testified that he never received any threats from Petitioner, or was put in fear by him.

Besola, the other victim named in the indictment, testified that he borrowed money from Falso in August or September of 1967 with the payments to Falso being made through Besola's employee, but later left at Petitioner's house.

Besola testified that he never saw Petitioner when the payments were left at his house, and the only thing Petitioner said to him in connection with the loan was, "Why don't you clean up that matter that you owe my brother-in-law."

Prior to the trial Petitioner's defense counsel had taped a phone conversation with Besola, who told him that he had no fear of Petitioner nor had Petitioner ever threatened him.

"Mr. Ragano: Let me ask you: to your knowledge, did Eddie Coco ever threaten you at any time?

Mr. Besola: I don't think he is that kind of person."

Prior to the trial, Petitioner's defense counsel had also taken the sworn testimony of Besola's son, Richard Besola, Jr., who told them that he had not known any thing about the loan.

At the trial, however, Besola varied his testimony from that given on the phone to Petitioner's counsel, and stated that while he was not in fear because of the loan, his family was fearful. Defense counsel claimed surprise and attempted to subpoena Besola, Jr., to impeach or rebut his father's testimony. The Court refused a two (2) hour continuance to allow defense counsel to present this witness.

The last witness for the Government was Martin Davidow whose testimony involved transactions not involving Petitioner.

The entire Government testimony clearly indicates that any fear in the victims' minds was *not based on any action, word or deed of the Petitioner.*

REASONS FOR GRANTING THE WRIT

1. Petitioner Coco filed A Motion for Severance of Defendants and Separate Trials. The court denied the Motion. Petitioner was tried by a jury with alleged co-conspirator Nash; the other Defendant, Falco, was not served and was not brought to trial.

The grounds alleged in support of Petitioner's Motion for Severance stated that Petitioner required the testimony of his co-defendant Nash, named in the indictment, to introduce prior statements of defendant Nash to certain F.B.I. Agents to the effect that Petitioner did not commit any of the illegal acts charged. Petitioner contended that he would be deprived of a fair trial by the joint trial of defendants.

Petitioner alleged that his joint trial would deprive him of the use of the exculpatory evidence and the right to call witnesses on his behalf. Attached to the Motion were four separate statements made by co-defendant Nash to FBI agents. The statements of co-defendant Nash exonerated the Petitioner. The Motion asserted that counsel had been advised by counsel for co-defendant Nash that Nash would not take the stand to testify at the trial. The Motion therefore requested that Petitioner be tried subsequent to defendant Nash so that favorable inferences could be drawn in the event that defendant Nash invoked his Fifth Amendment privilege.

During the trial, counsel for Petitioner renewed the Motion for Severance several times, alleging prejudice to Petitioner as a result of the joint trial. Witness Goodman testified that the Petitioner and Nash had been in a shylocking business. That testimony did not relate to the victims or times alleged in the indictment. A Motion for Mistrial was denied.

Counsel for Petitioner indicated that this testimony now required him to call defendant Nash as a witness to testify about the statements made by Nash to the FBI agents. The Motion was denied. A Motion for Mistrial by counsel for Petitioner was denied.

During the course of the trial and in the presence of the jury, counsel for Petitioner called co-defendant Nash to the stand. Upon denial of defendant Nash's Motion for Mistrial, Petitioner renewed his Motion for Severance on the grounds that his right to call witnesses as guaranteed to him by the Sixth Amendment had been violated. The court maintained that Petitioner was not entitled to a severance unless defendant Nash would testify.

Counsel for Petitioner asserted that favorable inferences could be drawn from defendant Nash's refusal to testify and he could argue the same to the jury in a separate trial, and that Petitioner was being denied a fair trial since the inferences were not subject to comment in the joint trial.

A Motion for Severance was again denied and the exhibits consisting of reports by FBI agents obtained from interviews with co-defendant Nash wherein Nash stated he was never in the shylocking business with Petitioner were again made part of the record.

In *U. S. v. Echeles*, 352 F.2d 892 (7th Cir. 1965), the court held that where it appeared at a trial for conspiracy that the defendant would be unable to call his co-defendant to the stand to put exculpatory statements into evidence, the court's denial of the Motion for Separate Trial was error.

The court stated:

> "Nevertheless, a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial. Barton v. United States, 263 F.2d 894, 898 (5th Cir. 1959); United States v. Kahaner, 203 F.Supp. 78, 80-81 (S. D. N. Y. 1962); Schaffer v. United States, 221 F.2d 17, 19, 54 A.L.R. 2d 820 (5th Cir. 1955); United States v. Haupt, supra, 136 F.2d at 671; Hale v. United States, 25 F.2d 430, 438-439 (8th Cir. 1928). What constitutes abuse of discretion in terms of safeguarding each defendant's rights in such cases necessarily depends upon the facts in each particular case. Schaffer v. United States, supra, 221 F.2d at 19; United States v. Kahaner, supra, 203 F.Supp. at 81; Brady v. United States, 39 F.2d 312, 313 (8th Cir. 1930)."

The problem involved in *Echeles* was similar to the case at Bar. In *Echeles*, as here, the problem was to call a co-defendant to the stand to obtain statements holding defendant blameless. It was upon this ground that the court reversed, finding error in denial of the Motion for Separate Trial.

The Court stated in *Echeles:*

> "By its first and most familiar protection, this Fifth Amendment provision gives any person the right to refuse to answer questions which might

> tend to incriminate him. But equally important is the 'universally held' interpretation of this right prohibiting any person who is on trial for a crime *from being called to the witness stand.* 8 Wigmore on Evidence 406 (Claim of Privilege, § 2268); McCormick on Evidence 257-259 (Self-Incrimination, § 124) (1954)."

The Court cited *DeLuna v. United States,* 308 F.2d 140 (5th Cir. 1962), nothing the right of the co-defendant not to be called based upon the fact that the right of silence must be free of prejudicial comment.

It is respectfully submitted that in the case at Bar, as in *Echeles,* supra, a fair trial required that Petitioner have the opportunity to elicit the exculpatory evidence contained in the co-defendant's prior statements to the FBI in front of the jury. It is submitted that denial of the Motion for Severance was an abuse of discretion under these circumstances, and particularly prejudicial in view of the prior testimony by witness Goodman referred to earlier.

The error and prejudice resulting from the joint trial was compounded by testimony of witnesses not involved in the charges in the case at bar repeating statements by co-defendant Nash made in Petitioner's absence yet held to be attributable to Petitioner by virtue of the conspiracy charge. Petitioner's Motion to Strike the testimony of Davidow was denied. Thus, the Government was permitted to introduce testimony, adverse to Petitioner, but Petitioner was deprived of his right to contradict that testimony with exculpatory statements made by Nash.

As was the case in *Schaffer v. United States,* 221 F.2d 19, separate trials, where only two defendants were involved, would have been practicable.

It is respectfully submitted that Petitioner was deprived of due process of law and of the right to call witnesses in his own behalf as guaranteed to him by the Fifth and Sixth Amendments to the United States onstitution, respectively, by the Court's denial of a separate trial.

2. At trial, the Government introduced a tape-recording made May 28, 1971 in which Petitioner mentioned persons not named in the indictment.

The charges in the indictment were alleged to have occurred between January 1, 1967 continuing up to about August 1, 1970. Nevertheless, the Government contended that the conversation on the tape-recorder made in May, 1971, was admissible to show Petitioner's intent.

The conversation on the tape included statements by Petitioner that he would "bust their heads with his knuckles", referring to persons not mentioned in the case at Bar.

It is submitted that the tape made *a year after the events charged* failed to disclose the specific intent to commit the acts charged against Whitice and Besola.

In the case at Bar, the indictment named specific victims of the crimes charged, namely, Besola and Whitice.

The Government contended that the tape-recordings were admissible solely against Petitioner and only to show intent. The nature of the intent, whether general or specific, was not delineated either in argument by the Government to the court, or in the instruction given the jury by the court.

The tape was made *approximately one year after the events charged,* rendering its contents violative of rules of evidence concerning relevancy; it was too remote to have probative bearing on the issues before the jury. The lapse of time between the tape-recording and the alleged crimes was such that a different intent may well have emerged in the interim, and was not present initially.

In *Kowalchuck v. United States,* 176 F.2d 873 (6th Cir. 1949) the court pointed out:

> "Where intent and knowledge are essential elements of the crime for which a defendant is being tried, evidence of other transactions, even though criminal in nature, is admissible if the transactions are so connected with the offense charged that they serve to show a general pattern and to prove the necessary criminal intent or guilty knowledge."

It is to be noted that the transactions must be connected with the offense charged in order to prove necessary criminal intent. It is submitted that in the case at Bar two factors prevent the general rule, permitting admissibility of subsequent acts to show intent, from applying.

First, the remoteness in time, and second, the fact that persons not named in the indictment were mentioned in the tape-recording.

No threat by Petitioner was offered as testimony from any witness. Any threats alleged to have occurred were attempted to be proved by the Government through inference, based upon Petitioner's reputation, and through statements made by witnesses (not victims of crimes charged) testifying for the Government. Thus,

the only spoken threat allegedly made by Petitioner occurred a year later, concerning persons unrelated to the crimes charged, not to the persons alleged as victims.

It is respectfully submitted that this evidence was incompetent by virtue of its irrelevant character and that it failed to qualify as admissible evidence for purposes of showing specific intent as to the named victims; thereby depriving the Petitioner of due process of law as guaranteed to him by the Fifth Amendment to the United States Constitution.

3. The witness Goodman testified that Falco, Nash, and Petitioner were in the money lending business and shylocking business. A Motion for Mistrial was denied. Later, Goodman testified that Petitioner came to his office with reference to his *probation*. A Motion for Mistrial was denied.

Witness Goodman testified about a loan that Petitioner had agreed to make and Nash was to collect. The person to whom the loan was made and the time of making the loan were not mentioned.

Several conversations of this sort were the subject of Goodman's testimony. Objection was made by counsel for Petitioner on the ground that it was necessary to show that the victims of the crimes charged were in fear before testimony of prior acts of defendant was admissible to show that the victims might have a reason for being in fear of Petitioner.

Henzel then testified concerning a loan Nash had made him and Nash had said it came from "underworld elements, Mafia and so forth."

A Motion by counsel for Petitioner Coco requesting an instruction to the jury to disregard the witnesses' testimony as to Petitioner was denied.

It is respectfully submitted that the court committed prejudicial error when it permitted persons who were not involved in the crime charged in the indictment to testify concerning their own problems with another defendant.

Testimony of witnesses, Goodman and Henzel, was immaterial, irrelevant and prejudicial to defendant by permitting evidence of other crimes and bad reputation to come to the jury without proper predicate. In *Michelson v. U. S.*, 335 U. S. 369, 69 Sup. Ct. 213 (1948), this Honorable Court stated:

> "Courts that follow the common-law tradition almost unanimously have to come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States,* 245 U. S. 559, 38 S.Ct. 209, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The Government attempted to prove that certain individuals, not named in the indictment, were afraid of defendant Nash. It was necessary, however, for the Government to prove that Besola and Whitice were afraid, since they were the *only* victims specifically alledged in the indictment. The testimony of Goodman and Henzel sheds no light on the state of mind of either Besola or Whitice and is totally unconnected with the events involved in the case at Bar. It is the state of mind of the victim that is relevant, and evidence of third parties as to the state of mind of other persons has no probative value to the issues at Bar. *U. S. v. Tolub,* 309 F.2d 286 (2nd Cir. 1962), citing *U. S. v. Palmiotti,* 254 F.2d 491 (2nd Cir. 1958).

In *U. S. v. Tropiano,* 418 F.2d 1069 (2nd Cir. 1969), the court permitted evidence of bad reputation as relevant where it was shown the victims had knowledge of the defendant's bad reputation.

In *Carbo v. U. S.* 314 F.2d 719 (9th Cir. 1963), the court stated:

> "In cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim. To prove a substantive act of attempted extortion, it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear."

Under the circumstances in the case at Bar, testimony elicited from Henzel and Goodman served only to prejudice the jury against Petitioner and to introduce testimony which could not possibly prove the state of

mind of the alleged victims in the case at Bar or the crime charged. The prejudice occurred not only from the statements inadvertently made which caused severe damage to Petitioner by references to the "Mafia" and to Petitioner's probation in another case, but also through the admission of testimony of witnesses as to unrelated events and crimes not charged in the indictment.

It is most respectfully submitted that the Lower Court's error in admitting the prejudicial testimony of Goodman, Henzel and Davidow, before the Government admittedly *first* made out a case against the Petitioner by the testimony of Whitice and Besola, was compounded by the fact that Petitioner's counsel had taken statements from Whitice and Besola before the trial and their said statements exonerated the Petitioner of the offenses set forth in the indictment. Moreover, *when the Lower Court denied Petitioner's Motion for List of Witnesses,* it left the Petitioner totally in the dark and prevented him from intelligently preparing his defense for trial since he had no way of knowing what witnesses the Government intended to use at the trial.

Moreover, in ruling that when Goodman testified that "The first time I met Mr. Coco, this was with reference to seeing if I could get him probation * * * *" the said testimony did not affect the substantial rights of the Petitioner to a fair trial since the Petitioner "Coco himself introduced a tap recording of an interview with Richard Besola that included a clear reference that Coco had been in prison * * * *", the United States Court of Appeals for the Fifth Circuit must have overlooked the following facts. Petitioner's counsel, when offering the said tape recording into evidence, offered it with the *qualification* that that portion referred to above by the Court be *deleted*. However, the Trial Judge

took the position that he would not permit any portion of the taped conversation to go before the jury unless it included that portion that left the impression that Petitioner had been imprisoned, to which Petitioner's counsel vigourously objected, but ultimately had no *alternative* except to play the taped conversation in its entirety to the jury because of the exculpatory nature of the said taped conversation as a whole. This was done without waving the Petitioner's rights. It is most respectfully submitted that the foregoing prejudicial remark, which represented an attack on the Petitioner's character, is clearly prohibited when a defendant does not place his character in issue, which was not done in the case at Bar. *Michelson v. U. S.*, 335 U. S. 369, 69 Sup. Ct. 213.

For these reasons it is respectfully submitted that Petitioner was deprived of due process of law and a fair trial as guaranteed to him by the Fifth Amendment to the United States Constitution.

4. Counsel for Petitioner interviewed one of the two named victims in the indictment, Besola, prior to trial, by means of a transcribed telephone conversation. During said interview, Besola told counsel that he was never in any fear of Petitioner, nor had any kind of threats been made to him by Petitioner. A sworn statement of Besola's son, Richard Besola, Jr., was also taken prior to trial, and his testimony indicated that he nor his mother knew nothing about the loan transaction and really didn't know Petitioner. Thus, based on Besola's statements to counsel, prior to trial, there was absolutely no reason to subpoena Besola, Jr.

At the trial, however, Besola, Sr. varied his testimony from that given to Petitioner's counsel and stated that while he personally was not in fear of the Petitioner, his family was.

Naturally, defense counsel was surprised and immediately attempted to subpoena Besola, Jr. who had told Petitioner's attorney that he did not even know Petitioner.

The Petitioner rested his case, with the proviso, so he thought, that it would be reopened when Besola, Jr. appeared. When, however, Besola, Jr. appeared, the Court refused to allow the Petitioner to put this vital witness on the stand for no apparent valid reason, and thus Petitioner was not allowed to rebut Besola's testimony that his family was in fear. We think this to be clearly an abuse of discretion on the part of the trial court.

In *Paschen v. United States,* 70 F.2d 491 (7th Cir. 1934), the Court stated:

> "The Court in its sound discretion always has the power, and it is its duty, to protect a defendant against surprises in the development of the Government's case, and against a defendant being placed in position where he is at an unreasonable and unfair disadvantage. If further time is necessary to enable the defendant to meet unexpected developments, reasonable postponement may and should in a proper case be granted; and indeed, where it is plainly apparent that a defendant is surprised by certain evidence, and is thereby placed at an unfair disadvantage through being thus unprepared to meet it * * * *".

In light of the foregoing facts, Petitioner's counsel was indeed surprised with Besola, Sr.'s testimony at the trial that his family had been fearful because of his dealings with the Petitioner. Since the Court proceedings were not concluded until approximately 7:00 P.M., Petitioner's counsel, before Court convened the following morning, caused a subpoena to be issued for Besola, Jr. and turned the same over to a process server who produced the said Besola, Jr. within two (2) hours after the Petitioner had moved for a brief continuance in order to produce the witness, Besola, Jr.

It is respectfully submitted that the Trial Judge violated the Petitioner's right to call witnesses on his behalf as guaranteed to him by the Sixth Amendment to the United States Constitution when he abused his discretion by not allowing the Petitioner to call to the stand Besola, Jr., which testimony was crucial rebuttal testimony in view of the unexpected testimony given earlier by Besola, Sr.

CONCLUSION

For the foregoing reasons, the Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
Ettore Coco

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to the Honorable Robert Rust, U. S. Attorney, 14 N.E. First Avenue, 300 Ainsley Building, Miami, Florida, this day of August, 1973.

FRANK RAGANO

APPENDIX

Opinion A-2

Petition for Rehearing A-23

Order Denying Petition for Rehearing A-29

Indictment A-30

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3441

UNITED STATES OF AMERICA,
Plaintiff-Appellee
versus
LOUIS NAKALADSKI, a/k/a LOUIS NASH,
ETTORE COCO, a/k/a EDDIE COCO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(July 6, 1973)

Before BELL, GOLDBERG and SIMPSON,
Circuit Judges.

GOLDBERG, Circuit Judge: Appellants, Louis Nakaladski, a/k/a Louis Nash [hereinafter "Nash"], and Ettore Coco, a/k/a Eddie Coco [hereinafter "Coco"], were convicted of violating various anti loan sharking provisions of Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891 *et seq.* Specifically, they were found guilty of: (1) conspiring to make and making extortionate extensions of credit in violation of 18 U.S.C. § 892;[1] (2) conspiring to participate and participating

[1] 18 U.S.C. § 891 (6) defines an extortionate extension of credit as:

> "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

in the use of an extortionate means to collect an extension of credit in violation of 18 U.S.C. § 894;[2] and (3) obstructing commerce by extortion in violation of the anti-racketeering provisions of the Hobbs Act, 18 U.S.C. § 1951. Appellants attack their convictions on numerous grounds, however we find that appellants received a full and fair trial and that there is ample evidence to support their convictions. We affirm.

I. THE PROCEEDINGS BELOW

Appellants were charged in an eight-count indictment with various violations of federal laws outlawing extortionate credit practices. At the trial, the government presented evidence concerning appellants' credit loan transactions with the two victims named in the indictment, Joel Whitice and Richard Besola, in order to prove the crimes charged in the indictment. The government also introduced evidence concerning similar extortionate credit transactions appellants had with other individuals in order to establish appellants' intent and their general conspiratorial course of conduct.

Viewed in a light most favorable to the government, *Glasser v. United States,* 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680, 704, the evidence introduced at the trial established that Coco, Nash, and one James Michael Falco[3] were in the loan sharking business together as early as 1966. During that year they began to transact some of their business in the offices of one Harvey Goodman, a mortgage and insurance broker. Goodman testified that he heard discussions concerning the making of loans and collections. When Nash or Fal-

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[2] 18 U.S.C. § 891 (7) defines an extortionate means of collection as:

> "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

[3] James Michael Falco was indicted with appellants but is apparently a fugitive and was not tried with appellants.

co arranged to make a loan in Coco's absence they would telephone Coco to obtain his approval. On one occasion, Falco objected to a loan that Nash wanted to make on the ground that there had been difficulties in collecting a previous loan from the prospective borrower, but when Coco said that Nash would be responsible for collecting the new loan, it was approved.

The interest on the loans that Falco, Nash, and Coco made was shown to be highly usurious: (1) a $3,000 loan was repayable at the rate of $1,000 a month for four months; (2) a $400 loan, with $200 interest, was repayable at the rate of $50 a week. At one point Nash offered to extend loans to any of Goodman's customers who needed money at interest rates of "up to five percent per week."

Nash used Goodman's office to telephone borrowers in order to make collections. Goodman testified that on at least one occasion Nash threatened a delinquent debtor by saying "you better have our money there at one o'clock or I'll feed you your eyeballs." In April of 1967, Nash told Goodman that he needed "another strong man to work for him for collections," and Goodman offered to get in touch with a man named Raymond Seaman, who had a reputation "as muscle": Nash hired Seaman, whom he later described as "a good man, except he had a big mouth." After Seaman was found dead in a canal as a result of an automobile accident, Nash told Goodman, in the presence of Coco and Falco that Seaman "fell in the canal — nobody cared." Goodman testified that at that time "Mr. Coco did not say anything. He just smiled."

Appellants also advanced money to an individual named Leo Henzel. When Henzel received a $1,500 loan from Nash in November, 1966, he was told "[j]ust as easy as you get it, that's how easy we want it back." The terms of the loans were that he was to pay $300 per week interest until he had paid back the entire principal. This loan was finally settled eight or nine

months later with a $1,800 payment, by that time Henzel had already paid $4,500 to $5,000 in interest, making his total payment on the $1,500 loan between $6,300 and $6,800. When Henzel became delinquent in his payments, Nash called him and used obscene language in demanding the money. On several occasions, Nash informed him that the source of the loan money was "underworld elements, Mafia, and so forth."

Nash also lent $2,000 to Martin Davidow in October, 1966, on the condition that Davidow pay $150 per week for twenty weeks. In December of 1966, Davidow borrowed another $3,000, the terms being that he was to pay $150 in interest and $150 on the principal, in addition to the $150 from the October loan, for a total payment of $450. In February, 1967, Davidow borrowed another $3,000, on the same terms as his December, 1966 loan, raising his total weekly payment to $750. A few months later, Davidow borrowed from Nash again, bringing his total loan to approximately $10,000 and his total weekly payments to approximately $900. In the middle of 1969, Davidow fell about $1,000 behind in payments and arranged with Nash to pay $250 per week interest and nothing on the principal. By this time he had paid approximately $15,000 in interest and still owed the full $10,000 principal. When Davidow fell behind in his payments, Nash told Davidow that he "had better pay and that he [Nash] was aware of the fact that . . . [Davidow] had a wife and children." On another occasion Nash told Davidow that when a man named "Gee-Gee" had fallen behind in his payments, Nash had sent a couple of people to "straighten Gee-Gee out" by beating him up and that "Gee-Gee was making payments now."

In June or July of 1966, Joel Whitice procured his first loan from Falco. Whitice made most of his payments to Falco, who was accompanied by Nash and Coco on a number of occasions when he came to collect from Whitice. At other times Whitice also made payments to Nash or Coco. During this time Whitice oper-

ated a retail grocery business, Food Palace, Inc., in partnership with another man, selling items manufactured in various parts of the country. His initial loan was for $10,000, which he paid back in approximately one year with weekly payments of $300. In December of 1967, Whitice borrowed another $4,000, and in June he increased his total debt to $12,000. He paid interest on these loans at the rate of $25 per $1,000 per week, and by June of 1968 his total interest payment was $300 per week. By September of 1969, Whitice had paid approximately $27,600 in interest, and still owed the full $12,000 principal.

Whitice had borrowed the money for his grocery business and he made payments from the receipts of the business. While keeping up his payments to Falco, however, he fell behind in his payments to his suppliers. In June of 1969, the major supplier filed a complaint in state court alleging defaults on securities and promissory notes and sought the appointment of a receiver to take over the operation of Whitice's business. After negotiations, a stipulation was entered into permitting Whitice to operate the business for an interim period, on the condition that all checks had to be counter-signed by an accountant representing the supplier. The stipulation also provided that no payments of pre-existing claims or indebtedness were to be made during the interim period, but a specific exception was written in permitting the business to continue to make the weekly $300 payments to Falco because Whitice made it clear that he would not enter into any stipulation or agreement that did not allow him to continue making these payments. He explained that if he were forced to cut the payments off, it might result in harm to him or his family. The accountant representing the supplier recalled that Whitice stated that he was in fear of his life, and the supplier's attorney recalled Whitice saying, in effect, that if he could not make the payments he might as well jump out the window. The supplier's representatives therefore agreed to permit the payments to be made.

After the receiver took over Whitice's grocery business, Falco visited Whitice to inquire whether the latter had any property on which he could give a mortgage. Upon receiving a negative response, Falco said that he would forget the interest if Whitice could repay the principal, whereupon he was informed that the latter had no money at all. Later, after Whitice had gone into the bail bond business, Falco asked for further payments. Around May of 1970, Falco called from New Jersey and asked that money be mailed to him, and Whitice sent a check. Still later Falco called again and told Whitice not to send any more checks, and arranged to have money picked up from time to time at Whitice's office.

Richard Besola, a general building contractor, also procured a loan from Falco. In 1967, he needed money, and one of his subcontractors, a man named Rappa, contacted Falco, from whom Besola eventually received a $3,000 check. Besola was to pay the money back within thirty or sixty days, with an additional $600 as interest. When six or seven weeks went by and Besola had not repaid the loan, Coco visited him at his job site and told him that he had "made a deal" and had "better live up to it." Besola then commenced making weekly payments of $100, initially to sub-contractor Rappa, but later, after Rappa had indicated a desire not to be bothered with the matter, Besola brought them to Coco's house. Besola made payments on a sporadic basis, and made approximately twenty four payments in all. About a year after Besola first met Coco, Coco again visited him and inquired about getting the debt "squared up." He pointed out that Besola was at that time building a house for a banker, and suggested that Besola make an arrangement with the banker to get the loan paid off. Besola then procured a $1997 bank loan, which was converted into a certificate of deposit which was then issued and mailed to Falco on May 29, 1968. A $2,000 certificate of deposit that Falco had purchased on April 15, 1968 was put up as collateral for the

loan, and when Besola defaulted on the loan with $300 unpaid, Falco's collateral was cashed and applied to the loan, with the remaining $1,674.27 of the collateral being returned to Falco.

Besola had become concerned when he was unable to make the lump sum repayment to Falco within the agreed upon thirty-to-sixty day period. He felt that he had to get the loan repaid "one way or another," as he had become aware "after a few weeks went by that the people I borrowed from weren't exactly bankers." He knew, for example, that Coco had once been "involved in a shooting." Besola claimed that he was not personally afraid of Coco or Falco, but he was aware of the possibility that they could send "somebody out" to "put pressure" on him. His family, moreover, was worried, and communicated their fears to him and their expressed anxieties caused him anxiety and made him desire to settle the debt as soon as possible.

After a three day jury trial, at which the jury heard and considered all of the evidence concerning the foregoing transactions, the jury found appellants guilty of: (1) obstructing commerce by extorting payments from Joel Whitice in violation of the Hobbs Act, 18 U.S.C. § 1951; (2) conspiring to make extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892; (3) conspiring to use extortionate means to collect or to attempt to collect extensions of credit from Joel Whitice and Richard Besola in violation of 18 U.S.C. § 894; (4) making extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892; and of (5) using extortionate means to collect or to attempt to collect extensions of credit from Joel Whitice in violation of 18 U.S.C. § 894. Coco alone was convicted of using extortionate means to collect or to attempt to collect extensions of credit from Richard Besola in violation of 18 U.S.C. § 894. Nash received concurrent sentences of ten years imprisonment on each count upon which he was convicted and was fined $5,000 on the § 1951 count. Coco received concurrent sentences of fif-

teen years imprisonment on each of the six counts upon which he was convicted, and was fined $10,000 on each count for a total fine of $60,000.

In this appeal, appellants jointly attack their convictions, contending that:

(1) The District Court erred in admitting the testimony of Goodman, Henzel and Davidow.

(2) The evidence was insufficient to support appellants' convictions.

(3) The District Court erred in admitting a tape recording of a conversation appellant Coco had engaged in that was made approximately ten months after the events named in the indictment.

(4) Improper statements by witnesses prejudiced the jury and denied appellants a fair trial.

(5) The District Court erred in refusing Coco's motion for a severance.

(6) The District Court erred in refusing Coco's requests for a continuance.

(7) The grand and petit juries that indicted and convicted appellants were improperly selected.[4]

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[4] Appellants have joined in each other's assignment of error. Our dispositions of their assignments jointly in no way represent a ruling on the standing of each to assert the errors relied upon by the other.

II. THE GOODMAN-HENZEL-DAVIDOW TESTIMONY

Appellants contend that the trial judge erred in allowing the government to present the testimony of Goodman, Henzel and Davidow concerning criminal transactions that were not specifically mentioned in the indictment and that occurred during time periods not covered by the indictments on the grounds that such testimony was irrelevant and prejudicial. Although evidence of criminal conduct not charged in the indictment may not be admitted if it serves solely to show the defendant's bad character or criminal propensities, *see Michaelson v. United States,* 1948, 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed. 168, 173-174, the testimony of Goodman, Henzel and Davidow was not admitted for that purpose. Their testimony was highly relevant, and it was admissible because it established that appellants had entered into a conspiracy to make extortionate extensions of credit and to collect payments by extortionate means as early as 1966 and that this general conspiracy was carried over into appellants' dealings with Whitice and Besola. The challenged testimony illuminated the nature of the conspiracy and established that appellants were not merely fringe associates in the conspiracy, but rather intended to actively participate in that conspiracy. Thus the Goodman-Henzel-Davidow testimony was relevant and admissible to show: (1) appellants' motive and intent in their dealings with Whitice and Besola; *Matthews v. United States,* 5 Cir. 1969, 407 F.2d 1371, 1381, *cert. denied,* 1970, 398 U.S. 968, 90 S.Ct. 2177, 2178, 26 L.Ed2d 554; *Myers v. United States,* 5 Cir. 1967, 377 F.2d 412; *Wilkins v. United States,* 5 Cir. 1967, 376 F.2d 552, *cert. denied,* 1968, 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1144; *Weeks v. United States,* 10 Cir. 1963, 313 F.2d 688, *cert. denied,* 1963, 373 U.S. 922, 83 S.Ct. 1523, 10 L.Ed.2d 421; *Devoe v. United States,* 8 Cir. 1939, 103 F.2d 584, *cert. denied,* 1939, 308 U.S. 571, 60 S.Ct. 84, 84 L.Ed. 479; (2) appellants' method of business, their "overall modus operandi"; *United States v. Haley,* 8 Cir. 1971, 452 F.2d 391, *cert.*

denied, 1972, 405 U.S. 978, 92 S.Ct. 1205, 1206, 31 L.Ed.2d 253; (3) the existence of a general conspiracy of which the conspiratorial and substantive offenses involving Whitice and Besola were integral parts; *United States v. Restrepo*, 5 Cir. 1969, 417 F.2d 927; *Matthews v. United States, supra; Collins v. United States*, 10 Cir. 1967, 383 F.2d 296; *Devoe v. United States, supra;* and (4) the relation between appellants and Falco; *Devoe v. United States, supra.*[5]

III. SUFFICIENCY OF THE EVIDENCE

A. The Section 892 Convictions

Appellants were convicted of conspiring to make and making extortionate extensions of credit to Joel Whitice in violation of 18 U.S.C. § 892. An extortionate extension of credit is one in which both the creditor and the debtor understand that default or delinquency in making payments "could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person." 18 U.S.C. § 891(6). In order to convict appellants of conspiring to make an extortionate extension of credit, it was necessary for the government to prove only that appellants had planned and intended that Whitice would under-

[5] Appellants also contend that the Goodman, Henzel, Davidow testimony should not have been admitted because these individuals were not named in the indictment and appellants were consequently unable to prepare for trial. In effect, appellants are complaining because the government failed to provide them with a list of prospective witnesses and with information sought in their motion for a bill of particulars. We find no abuse of the trial court's discretion in its refusal to require the government to provide a list of witnesses, *United States v. Mosely*, 5 Cir. 1971, 450 F.2d 506, 510; *United States v. Hancock*, 5 Cir. 1971, 441 F.2d 1285, *cert. denied*, 1971, 404 U.S. 833, 92 S.Ct. 81, 30 L.Ed.2d 63; *O'Neal v. United States*, 5 Cir. 1969, 411 F.2d 131, *cert. denied*, 1969, 396 U.S. 827, 90 S.Ct. 72, 24 L.Ed. 2d 77, or in its refusal to grant appellants' motions for bills of particulars in their entirety. *Hickman v. United States*, 5 Cir. 1969, 406 F.2d 414, 415, *cert. denied*, 1969, 394 U.S. 960, 89 S.Ct. 1309, 22 L.Ed. 2d 561.

stand the possibility that harmful consequences could be attendant upon his default or delinquency. *United States v. Annoreno,* 7 Cir. 1972, 460 F.2d 1303, 1309 n. 7; *see Carbo v. United States,* 9 Cir. 1963, 314 F.2d 718, 740-741, *cert. denied,* 1964, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498. In order to prove the substantive violation of §892, however, it was essential for the government to prove that Whitice actually had such an awareness of the possible harm that could arise from default or delinquency in repaying the loans to Falco.

We find that the government carried its burden both with regard to the conspiracy count and with regard to the substantive count. The testimony clearly showed the existence of a conspiracy between Falco, Coco, and Nash to make extortionate extensions of credit, and it was entirely reasonable for the jury to find that this conspiracy embraced appellants' dealings with Whitice. Likewise, although the loans to Whitice were made by Falco, appellants participated both in the conspiracy to make the extortionate loans and in the collections from Whitice, and there can thus be no question of their culpability for the substantive crime. *Pinkerton v. United States,* 1946, 328 U.S. 640, 646-647, 66 S.Ct. 1180, 90 L.Ed. 1489, 1496-1497.

Appellants contention that the court erred in allowing witnesses to testify concerning Whitice's fear of the consequences of non-payment because Whitice was available to give "direct" testimony concerning his understanding of the dangers attendant upon default or delinquency is also without merit. If in order to convict for violations of § 892, the government is required to establish the crime through the testimony of an available victim, the congressional intent to protect citizens from extortionate credit practices could be circumvented by terrorizing the victim. *See United States v. DeLutro,* 2 Cir. 1970, 435 F.2d 255, 256, *cert. denied,* 1971, 402 U.S. 983, 91 S.Ct. 1657, 29 L.Ed.2d 148. The testimony of an accountant and an attorney who dealt with Whitice when he was being placed in receivership con-

cerning Whitice's obvious fear of missing a payment is ample "direct" evidence of Whitice's state of mind concerning the nature of his loans. The evidence of Whitice's state of mind was perhaps even more probative than any "direct" testimony would have been because it graphically demonstrated that he was aware that harmful consequences could arise from default or delinquency in paying the loans to Falco. *See United States v. DeCarlo,* 3 Cir. 1972, 458 F.2d 358, 363-365.

B. The Section 894 Convictions

In order to find appellants guilty of conspiring to use extortionate means to collect or to attempt to collect extensions of credit from Joel Whitice and Richard Besola in violation of 18 U.S.C. § 894 it was necessary for the jury to find that it was the intent of appellants to use threats or actual violence whenever necessary to collect payments from Whitice and Besola. The jury was presented with ample evidence that this was the *modus operandi* of the enterprise in which appellants were engaged, and the finding that appellants adhered to the conspiratorial plan and conspired to use threats, and violence if necessary, to collect payments from Whitice and Besola is entirely reasonable.

There was also ample evidence to support the jury finding that appellants had knowingly participated in the express or implicit threat of the use of violence or other criminal means to cause harm to the person, reputation, or property of Joel Whitice in collecting or attempting to collect loan payments from him. As previously discussed in Part IV, Subsection A, *supra,* appellants were parties to the making of extortionate extensions of credit to Whitice, extensions of credit which by their very definition were based upon Whitice's understanding that default or delinquency might result in the use of violence. Thus any collections on the extortionate extensions of credit to Whitice made by appellants, who knew of the extortionate character of the

loans, necessarily involved the implicit threat of the use of violence in violation of 18 U.S.C. § 894. In short, by accepting payments from Whitice, with knowledge of the extortionate nature of his loan, appellants "participated" in an extortionate collection means within the meaning of 18 U.S.C. § 894.

C. The Section 1951 Conviction

Appellants were also convicted of obstructing interstate commerce by extorting payments from Joel Whitice in violation of the Hobbs Act, 18 U.S.C. § 1951. They contend that this conviction cannot stand because there was no showing that Whitice was in fear and because the loan to Whitice was made personally to him, and not to Food Palace, Inc., his store, which purchased articles in interstate commerce.

In order to establish a violation of the Hobbs Act it was necessary for the government to show: (1) that appellants induced Whitice to part with property; (2) that they did so through the wrongful use of actual or threatened force, violence or fear; and (3) that in so doing they adversely affected interstate commerce. *United States v. Addonizio,* 3 Cir. 1972, 451 F.2d 49, 59, *cert. denied,* 1972, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812; *United States v. Tolub,* 2 Cir. 1962, 309 F.2d 286. Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to effect interstate commerce. All that is required is that trade be affected by extortion "in any way or degree," *Carbo v. United States,* 9 Cir. 1963, 314 F.2d 718, 732;[6] *see United States*

[6] In *Carbo v. United States, supra,* the court held that an extortionate transaction which affected a contract between a professional prize fighter and his manager, as well as the prize fighter's earnings, had sufficient effect on interstate commerce to support a Hobbs Act conviction because the interstate business of promoting professional championship boxing contests was affected in some degree by extortion aimed at obtaining control of a professional fighter. 314 F.2d at 732.

v. Addonizio, supra, 451 F.2d at 77, and that the victim have been induced to part with property through the use of fear. *United States v. Tolub, supra.* As discussed in earlier portions of this opinion, there was ample evidence from which the jury could determine that appellants participated in a scheme in which Whitice was induced by a reasonable fear to make payments on his loan, and that interstate commerce was affected by his inability to make payments to suppliers who were engaged in interstate commerce.

D. Coco's Section 894 Conviction

Appellant Coco, alone, was indicted and convicted for using extortionate means to collect or to attempt to collect extensions of credit from Richard Besola in violation of 18 U.S.C. § 894. He challenges this conviction on the ground that there was no evidence that Richard Besola had ever been threatened or placed in fear in connection with the loan payments that he made to Coco. At the trial, Besola testified that he was not personally afraid of Coco or Falco, however, he also testified that his family was in fear because of his transactions with Falco and Coco and that they communicated this anxiety to him. Moreover, Besola testified that he was concerned about paying off his loan and that "I knew after a few weeks that the people that I borrowed money from weren't exactly bankers." He further testified that there was always a possibility that Falco or Coco could send somebody out to put pressure on him and that he was aware that Coco had been involved in a shooting. Although Besola denied being in fear of Coco or Falco, the jury could reasonably have discounted this statement[7] and found from Besola's oth-

[7] There are numerous reasons why the jury could discount Besola's direct denial of fear and infer from his other testimony concerning the loan transaction that he had been implicitly threatened. For example, two logical explanations might be that: (1) his denials of fear were merely the bravado of a man anxious to maintain his *machismo;* or (2) his denials of fear were induced by a fear of testifying adversely to an individual who was known to him to be of a violent character.

er testimony that Coco had participated in the collection of a loan by the use of implicit threats.*

IV. THE TAPE RECORDING

Appellants contend that the District Court erred in admitting into evidence a legally obtained tape recording of a conversation that appellant Coco had with a party not involved in the indictment approximately ten months after the events charged in the indictment. In this conversation, Coco made a statement concerning what he would do to delinquent borrowers — that he would "bust their heads with his knuckles." This tape recording was admitted only with regard to appellant Coco and only for the limited purpose of showing his intent to commit the crimes charged in the indictment. Appellants recognize the general rule that events occuring subsequent to the crime charged in the indictment are admissible to show intent, where intent is an element of the offense charged, if the events are not "too remote in point of time from the offense charged." *Matthews v. United States, supra,* 407 F.2d at 1381; *see United States v. Goodwin,* 5 Cir. 1972, 470 F.2d 893, 899. They nevertheless contend that the tape was not admissible to show Coco's intent for two reasons: (1) persons not named in the indictment were mentioned in the tape recording, and (2) the tape was too remote in time to the events named in the indictment. "Evidence that similar or related offenses were committed over a period of time tends to show a consistent pattern of conduct highly relevant to the issue of intent." *Gilstrap v. United States,* 5 Cir. 1968, 389 F.2d 6, 9. Since intent is an element of all of the offenses for which Coco was charged,

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* Appellants reliance on the acquittals in *United States v. Falcone,* 1940, 311 U.S. 205, 85 L.Ed. 128, *Carbo v. United States, supra,* and *United States v. Webb,* 6 Cir. 1966, 359 F.2d 558, is unfounded. In all of those cases the conspiratorial convictions were reversed because there was no showing of a knowing participation in the charged illegal conspiratorial plan. In the case before us there is ample evidence that appellants knowingly adhered to and participated in the conspiratorial and substantive offenses charged.

and since the tape recording contained a conversation concerning Coco's method of dealing with delinquent borrowers, it is clear that the tape was admissible to show his intent to commit the crimes for which he was charged. Moreover, the trial court had discretion to weigh the prejudicial character of the conversation against its relevancy, *United States v. Bell,* 5 Cir. 1972, 457 F.2d 1231, 1237, and in light of the fact that Coco's conversation concerned a similar criminal transaction occurring less than one year after the events charged in the indictment, we find no abuse of that discretion. *See Nees v. Culbertson,* 5 Cir. 1969, 406 F.2d 621, 625, *cert. denied,* 1969, 395 U.S. 959, 89 S.Ct. 2098, 23 L.Ed.2d 745; *Miller v. United States,* 5 Cir. 1968, 397 F.2d 272, 274.[9]

V. THE "IMPROPER" TESTIMONY

Appellants allege that the District Court erred in failing to grant their motions for mistrial based upon the following testimonial incidents, which appellants claim denied them a fair trial:

(1) When government witness Goodman was asked what was said at the first time that Nash, Falco and Coco came together, he answered: "The first time I met Mr. Coco, this was with reference to seeing if I could get his probation —" at which point the government cut him off. Appellants contend that Goodman's voluntary statement naturally led the jury to infer that Coco had been convicted of a prior crime, *see United States v. Reed,* 7 Cir. 1967, 376 F.2d 226, and thus denied him a fair trial by prejudicing the jury. *See Michaelson v. United States, supra.* The government responds that a mistrial is not warranted if the challenged testimony was blurted out by a witness, *see United States v. Jacangelo,* 3 Cir. 1960, 281 F.2d 574, 576, unless there is a clear

[9] In *Miller v. United States, supra,* this Circuit approved the admission of evidence concerning an uncharged illegal transaction in order to show the accused's intent, even though the crime had occurred five years prior to the crime under consideration.

showing of prejudice. In light of the fact that Coco himself introduced a tape recording of an interview with Richard Besola that included a clear inference that Coco had been imprisoned, we find that Coco's substantial rights were not affected by Goodman's testimony. *See* Rule 52, F.R. Crim. P.; *Porter v. United States,* D.C. Cir. 1958, 258 F.2d 685, *cert. denied,* 1959, 360 U.S. 906, 79 S.Ct. 1209, 3 L.Ed.2d 1257. We do not in any way see how Nash's substantial rights might have been violated.

(2) Goodman also made two conclusory statements to the effect that appellants were partners with Falco in the shylocking business. Appellants' objections to these statements were sustained and the jury was directed to disregard them. We think that the trial judge's timely ruling and instructions fully safeguarded appellants' rights.

(3) Appellants allege that Goodman's testimony concerning Seaman's death in an automobile accident contained an implication that appellants were responsible for Seaman's death and that their motions for a mistrial based on this testimony should therefore have been granted. Goodman testified: "I asked Mr. Nash, because I knew him best of anybody, about if he knew anything of what happened to Ray Seaman. He said, 'Well, he fell in the canal and he had a big mouth — nobody cared.' " Goodman then testified that "Mr. Coco did not say anything. He just smiled." We find no error in the denial of appellants' motions for a mistrial. Goodman's testimony merely related appellants' own statements and actions. Any inuendo of wrongdoing raised by Goodman's testimony was thus derived solely from appellants' own statements and actions and constituted admissions concerning conduct taken in furtherance of the general conspiracy. *See United States v. Pierce,* 5 Cir. 1969, 411 F.2d 678; *Tucker v. United States,* 5 Cir.

1960, 279 F.2d 62, 64; *United States v. Steel*, 10 Cir. 1972, 458 F.2d 1164; *United States v. Alker*, 3 Cir. 1958, 255 F.2d 851.[10]

(4) Government witness Henzel testified that Nash had told him that money Henzel had borrowed from Nash "came from underworld elements, Mafia, and so forth." Appellants claim that this testimony was so prejudicial that the Court should have declared a mistrial. Although the mention of the "Mafia" may elicit fear and distaste in the minds of the average juror, it undoubtedly may also cause such a response in the average debtor, and we find that Henzel's testimony was so relevant to the crimes charged in the indictment that there was no error in its being considered by the jury. The fact that Nash told Henzel — an individual to whom he had lent money at exorbitant rates — that the money came from the "Mafia" was quite relevant in showing Nash's intent to put Henzel in fear and in showing the method of operation of the conspiracy. Any prejudice that might have been aroused through the use of the term "Mafia" was insignificant in comparison with the probative value of the fact that Nash used that term, and we find that the District Court did not abuse its discretion in striking the balance between relevancy and prejudice. *United States v. Bell, supra.* We therefore reject appellants' challenge to the fairness of their trial based upon the introduction of "improper" testimony.

VI. COCO'S MOTION FOR A SEVERANCE

Appellant Coco contends that the District Court erred in refusing to grant his motion for a separate trial. He contends that four statements Nash made to

[10] Assuming that there is an inuendo of wrongdoing in appellants' statement and actions, they do not constitute confessions to the crimes charged, but rather admissions concerning the general conspiracy, which were probative of appellants' intent to use force in furtherance of the conspiracy, and thus we are not faced with any of the problems raised by the admission of a co-defendant's confession to the crimes charged. *See Bruton v. United States*, 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476.

FBI investigators exculpated him and that he was prejudiced by his inability to call Nash to the stand to question him concerning the statements.

The grant or denial of a motion for a separate trial under Rule 14 F.R. Crim. P. is largely a matter for the discretion of the trial judge. *Opper v. United States,* 1954, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101; *Smith v. United States,* 5 Cir. 1967, 385 F.2d 34, 37. Only if the defendant can demonstrate a clear showing of prejudice resulting in the denial of a fair trial will the discretionary ruling of the trial judge be reversed on appeal. *United States v. Iacovetti,* 5 Cir. 1972, 466 F.2d 1147, 1153; *Smith v. United States, supra.* Coco did not make a convincing showing that Nash would be more likely to give exculpatory testimony for Coco if the trials were severed,[11] *Byrd v. Wainwright,* 5 Cir. 1970, 428 F.2d 1017, 1022, and we find that the District Court did not abuse its discretion in denying Coco's motion for a separate trial. *United States v. Iacovetti, supra,* 460 F.2d at 1153; *Smith v. United States, supra,* 385 F.2d at 38.

Relying on *DeLuna v. United States,* 5 Cir. 1962, 308 F.2d 140, Coco also contends that a separate trial should have been granted so that in the event that Nash took the stand and claimed the Fifth Amendment, Coco would have been able to urge the jury to draw favorable inferences from Nash's refusal to testify. The *DeLuna*

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[11] At trial, the only showing that Coco made that Nash *might* testify is contained in the following colloquy between Coco's attorney and Nash's attorney:

> Coco's attorney: "Are you saying now that if the Court were to grant a severance and your client, Mr. Nash, were tried first and if he were acquitted, that he would subsequently testify in Mr. Coco's trial?" Nash's attorney: "I am saying if that course of events took place, that there would certainly be serious consideration of his testifying."

On these facts, Coco's contention of prejudice is at best speculative, since Nash would only consider testifying *if he were acquitted,* and "[w]e do not conjecture abuses of discretion." *Smith v. United States, supra,* 385 F.2d at 38.

ruling, which recognized the right of defendants in certain circumstances to comment on the failure of a co-defendant to testify, is, however, limited only to those occasions where the defendants' defenses are based on mutually exclusive theories of guilt, *United States v. Hyde*, 5 Cir. 1971, 448 F.2d 815, 832, *cert. denied*, 1972, 404 U.S. 1058, 92 S.Ct. 736, 737, 30 L.Ed.2d 745, that would create a duty upon counsel to comment upon the refusal of the other defendant to testify. *Gurleski v. United States*, 5 Cir. 1968, 405 F.2d 253, *cert. denied*, 1969, 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769. No such mutually exclusive defense theories are presented in the instant prosecution.

VII. COCO'S MOTION FOR A CONTINUANCE

Near the close of the trial Coco moved for a two hour continuance or for permission to reopen so that he could introduce rebuttal testimony from Richard Besola's son. Coco alleged that he was taken by surprise when Richard Besola testified that his family had been fearful because of his dealing with Coco and Falco because Besola had denied any fear in a pre-trial conversation with Coco's attorney. Coco alleged that Richard Besola's son would testify that the family was not in fear. The Court denied Coco's motions on the grounds that (1) there was no surprise, and (2) Coco could have subpoenaed the son either before the trial began or on the evening prior to the close of the trial, immediately after he was allegedly "surprised."

After considering (1) the text of Richard Besola's pre-trial conversation with Coco's attorney, (2) his "surprise" trial testimony, (3) a transcript of Besola's son's allegedly contradictory remarks, and (4) Coco's attorney's statements concerning the failure to timely subpoena Besola's son, we do not find that the trial court erred in determining that Coco was not surprised and that he had failed to exercise due diligence in subpoenaing Besola's son. We therefore hold that the District Court did not abuse its discretion in denying Co-

co's motion for a continuance, *United States v. Roca-Alvarez*, 5 Cir. 1971, 451 F.2d 843, and his motion to reopen. *United States v. Burger*, 5 Cir. 1969, 419 F.2d 1293.

VIII. THE GRAND AND PETIT JURY PANELS

Appellants final contention is that they were denied a fair trial because the grand and petit jury selection methods utilized at the time and place of their indictment and trial excluded two groups of potential jurors: young voters and Cuban Americans. This argument has been considered at length and rejected by this Circuit in *United States v. Gooding*, 5 Cir. 1973, 473 F.2d. 425, and we are bound by the rationale and decision in that case.

IX. CONCLUSION

Appellants have raised a skillful but unconvincing multifaceted attack on their convictions. Being firmly convinced that appellants received a fair trial and that the jury's verdict was supported by the evidence, we affirm.

AFFIRMED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3441

UNITED STATES OF AMERICA,
Respondent-Appellee,
vs.
ETTORE COCO, a/k/a EDDIE COCO, et al,
Petitioners-Appellants.

PETITION FOR REHEARING

COMES NOW the Petitioner, ETTORE COCO, by his undersigned counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and within the time provided therein, files this his Petition for Rehearing directed to this Honorable Court's Opinion rendered on July 6, 1973 and as grounds thereof would respectfully show:

I.

This Honorable Court must have misapprehended Petitioner's position when it stated in footnote five (5) on page twelve (12) of its Opinion that Appellants contend that the testimony of the witnesses Goodman, Henzel and Davidow, should not have been admitted because they were not named in the indictment and the Lower Court had denied Petitioner's Motion for a List of Witnesses. This Honorable Court gave three (3) reasons why his testimony was properly admitted, namely, to show (1) Petitioner's motive and intent in his dealings with Whitice and Besola, (2) Petitioner's method of business, and "overall modus operandi" and (3) the existence of a general conspiracy of which the conspiratorial and substantive offenses involving Whitice and Besola were integral parts. The Petitioner would have no quarrel with the Court's reasoning had the Government *first* proved that the Petitioner was

guilty of the offenses he allegedly committed against Whitice and Besola, who were named in the indictment. However, the Government, by its own admission (see Government's Brief pages 14-15), did not rely on the testimony of Whitice and Besola, but instead was relying on the testimony of Goodman, Henzel and Davidow in order to prove the offenses set forth in the indictment against the Petitioner. In short, it is Petitioner's position that the testimony of Goodman, Henzel and Davidow would *only* have been admissible for the aforesaid three (3) reasons stated by the Court in its Opinion and under the authorities cited in support thereof had the Government *first* made out a case against the Petitioner by the testimony of Whitice and Besola, who were the only alleged victims named in the indictment. It is most respectfully submitted that the Lower Court's error in admitting the prejudicial testimony of Goodman, Henzel and Davidow, before the Government admittedly *first* made out a case against the Petitioner by the testimony of Whitice and Besola, was compounded by the fact that Petitioner's counsel had taken statements from Whitice and Besola before the trial and their said statements exonerated the Petitioner of the offenses set forth in the indictment. Moreover, when the Lower Court denied Petitioner's Motion for List of Witnesses, it left the Petitioner totally in the dark and prevented him from intelligently preparing his defense for trial since he had no way of knowing what witnesses the Government intended to use at his trial.

II.

It is most respectfully submitted that this Honorable Court in ruling that the highly prejudicial tape recording of the Petitioner's voice, which was made approximately ten (10) months after the events charged in the indictment, where properly admitted by the Lower Court, it overlooked the facts set forth in the preceding paragraph and as a result thereof the Petitioner was deprived of a fair and impartial trial as guaranteed to him by the Federal Constitution.

III.

In ruling that when Goodman testified that "The first time I met Mr. Coco, this was with reference to seeing if I could get him probation* * * *" The said testimony did not affect the substantial rights of the Petitioner to a fair trial since the Petitioner "Coco himself introduced a tape recording of an interview with Richard Besola that included a clear reference that Coco had been in prison * * * *", this Honorable Court must have overlooked the following facts. Petitioner's counsel, when offering the said tape recording into evidence, offered it with the *qualification* that that portion referred to above by the Court *be deleted* (T. 605, 609). However, the Trial Judge took the position that he would not permit any portion of the taped conversation to go before the jury unless it included that portion that left the impression that Coco had been imprisoned, to which Petitioner's counsel vigorously objected, but ultimately *had no alternative* except to play the taped conversation in its entirety to the jury because of the exculpatory nature of the said taped conversation as a whole (T. 609). It is most respectfully submitted that the foregoing prejudicial remark which represented an attack on the Petitioner's character, is clearly prohibited when a defendant does not place his character in issue, which was not done in the case at Bar. See: *Michelson v. U. S.*, 335 U.S. 369, 69 Sup. Ct. 213.

IV.

In ruling that the Trial Judge did not abuse his discretion in denying Petitioner's Motion for a Separate Trial from that of his co-Defendant, LOUIS NASH, because the Petitioner had failed to make a clear showing of the prejudice resulting from the denial of said Motion, this Honorable Court must have overlooked the following facts. Pursuant to a Lower Court's order, Petitioner's counsel was furnished with four (4) written reports made by certain F.B.I. agents regarding their interviews, before the indictment herein was returned, with LOUIS NASH wherein LOUIS NASH

stated to the said F.B.I. agents that he was engaged in loan-sharking, which is the crux of the charges set forth in the indictment, with JAMES MICHAEL FALCO, Petitioner's co-Defendant (who was indicted along with Petitioner, but was not tried with Petitioner and NASH) in said activities, but not with the Petitioner (T. 635-636). That had the said Motion for Separate Trials been granted, then the Petitioner could have subpoenaed LOUIS NASH at his subsequent trial and if NASH testified, his testimony would have been indispensable to Petitioner's defense and had he invoked his privilege against self-incrimination, then the Petitioner could have subpoenaed the F.B.I. agents who made said written reports and extracted from them the above-described testimony and, in addition thereto, his counsel could have drawn favorable inference from LOUIS NASH's refusal to testify in his argument to the jury.

V.

In ruling that the Trial Court did not abuse its discretion in denying Petitioner's Motion for a Continuance and his Motion to Reopen his case, this Honorable Court must have overlooked or misapprehended the following facts. Besola, Sr. had given a statement to Petitioner's counsel before the trial clearly exonerating the Petitioner from any of the wrongdoings set forth in the indictment. Because of the apparent sincerity and emphatic nature of his said statement, Petitioner's counsel would necessarily have to assume that his testimony at the trial would be consistent with the statement given to him prior to the trial and therefore had no reason to subpoena his son, who had likewise given Petitioner's counsel a statement before the trial, which statement made it abundantly clear that he and his mother, who lived with Besola, Sr. in the same household, were not aware of the fact that Besola, Sr. ever had any dealings with Petitioner (T. 642-644). It is respectfully submitted that under said circumstances, there is no possible way that they could have been worried about his dealings with the Petitioner and that

they could have "communicated their fears to him (Besola, Sr.) and their expressed anxieties caused him (Besola, Sr.) anxiety", as this Honorable Court states at the bottom of page eight (8) of its Opinion. In light of the foregoing facts, Petitioner's counsel was indeed surprised with Besola, Sr.'s testimony at the trial that his family had been fearful because of his dealings with the Petitioner. Since the Court proceedings were not concluded until approximately 7:00 P.M., Petitioner's counsel, before Court convened the following morning, caused a subpoena to be issued for Besola, Jr. and turned the same over to a process server who produced the said Besola, Jr. within two (2) hours after the Petioner had moved for a brief continuance in order to produce the witness, Besola, Jr. In ruling that Trial Judge did not abuse his discretion in *not* allowing the jury to hear the testimony of Besola, Jr., this Honorable Court must have either overlooked or misapprehended the well established rule which is stated in the case of *Paschen v. United States,* 70 F.2d 491 (7th Cir.) as follows:

> "The Court in its sound discretion always has the power, and it is its duty, to protect a defendant against surprises in the development of the Government's case, and against a defendant being placed in position where he is at an unreasonable and unfair disadvantage. If further time is necessary to enable the defendant to meet unexpected developments, reasonable postponement may and should in a proper case be granted; and indeed, where it is plainly apparent that a defendant is surprised by certain evidence, and is thereby placed at an unfair disadvantage through being thus unprepared to meet it, * * * *".

VI.

In ruling that certain highly prejudicial remarks made by the Government's witnesses in the presence of the jury were admissible and therefore did not deprive the Petitioner of a fair trial, this Honorable Court must have overlooked or misapprehended the following facts.

That although no single remark standing alone may have deprived the Petitioner of a fair trial, the cumulative effect of these prejudicial remarks, which were not supported by facts but were merely conclusions drawn by the witnesses and innuendoes that were passed on to the jury by them, created a general atmosphere that necessarily precluded a fair trial. For example, Goodman's testimony that when he told the Petitioner that a certain Ray Seaman died when he fell into a canal, the Petitioner "did not say anything he just smiled". The clear inference left with the jury by said remark was that the Petitioner was somehow responsible for Seaman's death and there were no facts to support said inference. The witness Henzel testified that NASH told him that the money he had borrowed from him (NASH) "came from underworld elements Mafia, and so forth", which was not supported by any facts. Also, Goodman's highly prejudicial testimony referring to Petitioner's probation which was not in any way relevant to the issues before the Court and certainly not admissible. It is most respectfully submitted that this honorable Court must have overlooked the fact that the general atmosphere that was created during the course of the trial by the Government's witnesses said remarks deprived the Petitioner of a fair and impartial trial, as guaranteed to him by the Federal Constitution.

WHEREFORE, Petitioner prays that this Honorable Court will grant his Petition for Rehearing, set aside its Opinion of July 6, 1973 and thereafter remand the above-entitled cause to the Lower Court for a new trial.

Respectfully submitted,

FRANK RAGANO
Suite 400, Roberts Building
28 W. Flagler Street
Miami, Florida 33130
Attorney for Petitioner
ETTORE COCO

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-3441

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LOUIS NAKALADSKI, a/k/a LOUIS NASH,
ETTORE COCO, a/k/a EDDIE COCO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(July 30, 1973)

Before BELL, GOLDBERG and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant, Ettore Coco, a/k/a Eddie Coco in the above entitled and numbered cause be and the same is hereby denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 72-450-CR-PF

	:	18 USC 892
	:	(20 Yrs./$10,000)
	:	18 USC 894
	:	(20 Yrs./$10,000)
	:	18 USC 1951
	:	(20 Yrs./$10,000)
UNITED STATES OF AMERICA	:	
vs.	:	
ETTORE COCO, a/k/a	:	
EDDIE COCO;	:	INDICTMENT
LOUIS NAKALASKI, a/k/a	:	
LOUIS NASH; and	:	
JAMES MICHAEL FALCO	:	

THE GRAND JURY CHARGES:

Count 1

That from on or about January 1, 1967 and continuing thereafter up to on or about August 1, 1970, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, and other persons to the Grand Jury unknown, did wilfully, knowingly, unlawfully conspire, confederate, and agree together and with each other, to obstruct, delay, and affect interstate commerce as the term "commerce" is defined in Section 1951, Title 18, United States Code, and the movement of persons, articles, and commodities in commerce by extortion as the term "extortion" is defined in Section 1951, Title 18, United States Code, that is, to obtain property from another with his consent induced by the wrongful use of actual and threatened force and violence and fear.

It was a part of the said conspiracy that defendants ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO would obtain from Joel Whitice as an agent and

representative of "Food Palace, Inc.", a corporation engaged in interstate commerce, with his consent, properties of the said corporation, to-wit, the sum of approximately $27,000.00, the payment of which was induced by the wrongful use of actual and threatened force and violence and fear.

It was part of the said conspiracy that defendants ETTORE COCO, a/k/a EDDIE COCO; and JAMES MICHAEL FALCO would obtain from Richard Besola as an agent and representative of Besola Construction Company, a company engaged in interstate commerce, with his consent, properties of the said company, to wit, the sum of approximately $6,500.00, the payment of which was induced by the wrongful use of actual and threatened force and violence and fear.

In furtherance of said conspiracy and to effect the objects and purposes thereof, the following overt acts, among others, were committed in the Southern District of Florida and elsewhere:

1. In March, 1967, in the Southern District of Florida, defendant JAMES MICHAEL FALCO did provide Richard Besola with a check in the amount of $3,000.00.

2. During the period March, 1967, through May, 1968, in the Southern District of Florida, defendants JAMES MICHAEL FALCO and ETTORE COCO, a/k/a EDDIE COCO, collected weekly payments of $150.00 a week from Richard Besola, a total of approximately $4,500.00 in cash.

3. On or about May 30, 1968, defendant ETTORE COCO, a/k/a EDDIE COCO, caused Richard Besola to obtain a loan at the Boulevard National Bank.

4. On or about May 30, 1968, defendant JAMES MICHAEL FALCO, in the Southern District of Florida, received the proceeds of a loan made by the Boulevard National Bank to Richard Besola in the amount of $1,997.00.

5. In or about January, 1968, in the Southern District of Florida, defendant JAMES MICHAEL FALCO provided $4,000.00 to Joel Whitice.

6. In or about July, 1968, in the Southern District of Florida, JAMES MICHAEL FALCO provided $8,000.00 to Joel Whitice.

7. During the period January, 1968 through September, 1969, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, received weekly payments of $300.00 interest a week from Joel Whitice, a total of approximately $27,000.00.

8. During July, 1970, defendant JAMES MICHAEL FALCO received a check from Joel Whitice made payable to his wife, Bernice Falco.

All in violation of Title 18, United States Code, Section 1951.

THE GRAND JURY FURTHER CHARGES:

Count 2

That during the period January 1, 1967, up to and including August 1, 1970, ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, wilfully and knowingly obstructed, delayed and affected commerce and the movement of persons, articles and commodities in commerce by extortion, in that ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO did obtain from Joel Whitice, as an agent and representative of "Food Palace, Inc.", a corporation engaged in interstate commerce, with his consent, properties of the said corporation, to wit, the sum of approximately $27,000.00, the payment of which was induced by the wrongful use by the defendants of actual and threatened force and violence and fear.

All in violation of Title 18, United States Code, Sections 1951 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 3

That during the period March 1, 1967 up to and including May 30, 1968, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO, and JAMES MICHAEL FALCO, the defendants herein, wilfully and knowingly obstructed, delayed and affected commerce and the movement of persons, articles and commodities in commerce by extortion, in that ETTORE COCO, a/k/a EDDIE COCO, and JAMES MICHAEL FALCO did obtain from Richard Besola, as an agent and representative of Besola Construction Company, a corporation engaged in interstate commerce, with his consent, properties of the said company, to wit, the sum of approximately $6,500.00, the payment of which was induced by the wrongful use by the defendants of actual and threatened force and violence and fear.

All in violation of Title 18, United States Code, Sections 1951 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 4

That from on or about January 1, 1967, and continuing thereafter up to on or about August 1, 1970, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, and other persons to the Grand Jury unknown, did knowingly, wilfully and unlawfully combine, conspire, confederate, and agree together and with each other to make extortionate extensions of credit, as defined in Section 891, Title 18, United States

Code, that is, to make extensions of credit, with respect to which it was the understanding of the defendants and the debtor, at the time the extensions of credit were made, that delay in making, and failure to make repayment of the same, could result in the use of violence and other criminal means to cause harm to the person, reputation and property of the debtor and others.

It was part of said conspiracy that defendants ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, would make extensions of credit to Joel Whitice with respect to which extensions of credit it was the understanding of said defendants ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, and the debtor, Joel Whitice, that delay in making or failure to make repayment could result in the use of violence and other criminal means to cause harm to the person, reputation and property of the debtor, Joel Whitice, and others.

In furtherance of the said conspiracy and to effect the object and purposes thereof, the following overt acts, among other acts, were committed within the Southern District of Florida and elsewhere:

1. In or about July, 1968, in the Southern District of Florida, JAMES MICHAEL FALCO provided $8,000.00 to Joel Whitice.

2. During the period January, 1968 through September, 1969, in the Southern District of Florida, defendants ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO received weekly payments of $300.00 interest a week from Joel Whitice, a total of approximately $27,000.00.

All in violation of Title 18, United States Code, Section 892.

THE GRAND JURY FURTHER CHARGES:

Count 5

That from on or about January 1, 1967, and continuing thereafter up to on or about August 1, 1970, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, and other persons to the Grand Jury unknown, did knowingly, wilfully and unlawfully combine, conspire, confederate, and agree together and with each other to use extortionate means to collect and attempt to collect extensions of credit as defined in Section 891, Title 18, United States Code, that is, to expressly and implicitly threaten to use violence and other criminal means which would cause harm to the person, reputation and property of the debtor and others.

It was part of said conspiracy that defendant ETTORE COCO, a/k/a EDDIE COCO, would threaten, expressly and implicitly, the use of violence and other criminal means to cause harm to the person of Richard Besola to collect from Richard Besola extensions of credit.

It was part of said conspiracy that defendant ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO would threaten, expressly and implicitly, the use of violence and other criminal means to cause harm to the person of Joel Whitice to collect from Joel Whitice extensions of credit.

It was part of the said conspiracy that ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, would require debtors Joel

Whitice and Richard Besola to repay the said extensions of credit by making weekly payments to the defendants.

In furtherance of said conspiracy and to effect the objects and purposes thereof, the following overt acts, among others, were committed in the Southern District of Florida and elsewhere:

1. During the period March, 1967 through May, 1968, in the Southern District of Florida, defendants JAMES MICHAEL FALCO and ETTORE COCO collected weekly payments of $150.00 a week from Richard Besola, a total of approximately $4,500.00 in cash.

2. On or about May 30, 1968 defendant ETTORE COCO caused Richard Besola to obtain a loan at the Boulevard National Bank to pay off his debt.

3. On or about May 30, 1968, defendant JAMES MICHAEL FALCO, in the Southern District of Florida, received the proceeds of a loan made by the Boulevard National Bank to Richard Besola in the amount of $1,997.00.

4. In or about July, 1968, in the Southern District of Florida, JAMES MICHAEL FALCO made a loan of $8,000.00 to Joel Whitice.

5. During the period January, 1968 through September, 1969, in the Southern District of Florida, defendants ETTORE COCO, a/k/a EDDIE COCO; LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO received weekly payments of $300.00 interest a week from Joel Whitice, a total of approximately $27,000.00.

6. During July, 1970, defendant JAMES MICHAEL FALCO received a check from Joel Whitice made payable to his wife Bernice Falco.

All in violation of Title 18 United States Code Section 894.

THE GRAND JURY FURTHER CHARGES:

Count 6

That during the period June 1, 1968, up to and including August 1, 1970, ETTORE COCO, a/k/a EDDIE COCO, LOUIS NAKALADSKI, a/k/a LOUIS NASH, and JAMES MICHAEL FALCO, the defendants herein, wilfully and knowingly did make extortionate extensions of credit, as defined in Section 891, Title 18, United States Code, to Joel Whitice, that is, said defendants did make a loan in the amount of approximately $8,000.00 to Joel Whitice, with respect to said loan it was the understanding of the said defendants and Joel Whitice, at the time said extensions of credit were made, that delay in making repayment and failure to make repayment could result in the use of violence and other criminal means to cause harm to the person, reputation and property of Joel Whitice and others.

All in violation of Title 18, United States Code, Sections 892 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 7

That during the period June 1, 1968 up to and including August 1, 1970, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO, LOUIS NAKALADSKI, a/k/a LOUIS NASH; and JAMES MICHAEL FALCO, the defendants herein, wilfully and knowingly did participate in the use of extortionate means, within the meaning of Section 891 of Title 18, United States Code, in collecting and attempting to collect from Joel Whitice an extension of credit in the amount of $12,000.00, to wit: the defendants expressly and implicitly did threaten Joel Whitice with the use of violence and other criminal means which would cause harm to the person, reputation and property of Joel Whitice and others.

All in violation of Title 18, United States Code, Sections 894 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 8

That on or about May 30, 1968, in the Southern District of Florida, ETTORE COCO, a/k/a EDDIE COCO, and JAMES MICHAEL FALCO, the defendants herein, wilfully and knowingly did participate in the use of extortionate means, within the meaning of Section 891 of Title 18, United States Code, in collecting and attempting to collect from Richard Besola an extension of credit in the amount of $3,000.00, to wit: the defendants expressly and implicitly did threaten Richard Besola with the use of violence and other criminal means which would cause harm to the person, reputation and property of Richard Besola and others.

All in violation of Title 18, United States Code, Sections 894 and 2.

A TRUE BILL

_____

FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

_____

By: Gary L. Betz
Trial Attorney
U. S. Department
of Justice

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Nos. 73-376 and 73-449

FILED
OCT 31 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

ETTORE COCO, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS NAKALADSKI, A/K/A LOUIS NASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-376

ETTORE COCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-449

LOUIS NAKALADSKI, A/K/A LOUIS NASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented are whether evidence of transactions and occurrences not charged in the indictment are admissible to show the nature and scope of the conspiracy charged; whether a defendant is entitled to a severance in order to call his co-defendant as a witness; whether it was an abuse of discretion to deny a continuance and reopening in order that a rebuttal defense witness might be called; and whether, in a noncapital case, the names of proposed government witnesses must be disclosed to defendants.

After a three-day jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to make and of making extortionate extensions of credit, in violation of 18 U.S.C. 892, conspiring to use and using extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894, and obstructing commerce by extortion, in violation of 18 U.S.C. 1951. Petitioner Coco was given concurrent sentences of fifteen years' imprisonment on each of the six counts on which he was convicted and was fined $10,000 on each count, for a total fine of $60,000; petitioner Nakaladski was given concurrent sentences of ten years' imprisonment on each of the five counts on which he was convicted and was fined $5,000. The court of appeals affirmed in a lengthy opinion (Pet. App. A2-A22).[1]

The facts of the case are set forth in the opinion of the court of appeals. In essence they show that, from 1966 on, petitioners and one James Michael Falco (a fugitive co-defendant) were associated together under Coco's direction in the conduct of a loan-sharking business, in which threats of violence were frequently used to insure collection of the loans (Pet. App. A3-A5). The indictment was based upon loan transactions with two specific victims—Joel Whitice and Richard Besola—who procured their loans from Falco. Whitice made most of his payments to Falco, but made some to petitioners; although he was never threatened expressly, his awareness of the consequences of nonpayment was demonstrated by statements which he made to his legitimate creditors to gain their consent to his continuance of the payments which he was making to Falco

[1] "Pet. App." refers to the appendix to Coco's petition, No. 73-376.

(Pet. App. A5-A6). Besola, who was inferentially threatened by Coco when he fell behind in his payments, made payments to both Falco and Coco (Pet. App. A7 -A8).

1. Coco contends (Pet. 14-18) that he was prejudiced by assertedly irrelevant testimony concerning transactions and occurrences not charged in the indictment, which he claims was admitted only to show his reputation. The court of appeals correctly held that the evidence was properly admitted to establish petitioners' motive and intent, their method of doing business, the existence of a general conspiracy of which the conspiratorial and substantive offenses involving Whitice and Besola were integral parts, and the relationship between petitioners and Falco (Pet. App. A10-A11). Coco's further contentions—that he was entitled to a severance in order to call Nakaladski as a witness on his behalf (Pet. 8-12); that a legally obtained tape recording of a conversation occurring after the events charged in the indictment was irrelevant and its admission against him prejudicial (Pet. 12-14); and that it was an abuse of discretion to deny him a continuance and permission to reopen in order to call Besola's son to rebut Besola's testimony (Pet. 18-20)—were considered and properly rejected by the court of appeals (see Pet. App. A19-A21 as to severance, A16-A17 as to the tape recording, and A21-A22 as to the continuance), upon whose opinion we rely.

2. Nakaladski's sole contention is that his rights to due process and the effective assistance of counsel were violated by the trial court's refusal to require the government to disclose its witnesses in advance of trial, since the refusal left him with no forewarning that the government would offer evidence concerning

petitioners' general loan-sharking enterprise in order to illuminate the nature of the transactions involving Whitice and Besola. The court of appeals correctly adhered to the well-established rule that the refusal to require pretrial disclosure of the names of government witnesses is not an abuse of discretion (Pet. App. A11, n. 5). See *United States* v. *Annoreno*, 460 F. 2d 1303, 1310 (C.A. 7), certiorari denied, 409 U.S. 852. The cases upon which Nakaladski relies—which concern such matters as the duty of the prosecutor to disclose facts which are exculpatory or usable for impeaching prosecution witnesses (see Pet. 9-11), the constitutionality of notice-of-alibi rules (see Pet. 12), the right to adequate time in which to consult counsel (see Pet. 13), and the right of a defendant to present other witnesses before testifying himself (see Pet. 13-14)—do not support his contention.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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